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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NANCY CARLSON, Plaintiff and Appellant, v. CALLAHAN & BLAINE et al., Defendants and Respondents.	G048337 (Super. Ct. No. 30-2012-00605071) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Ronald L. Bauer, Judge. Affirmed.

Law Office of Dean R. Kitano and Dean R. Kitano for Plaintiff and Appellant.

Callahan & Blaine, Brian J. McCormack, Kristy A. Schlesinger, and Jill A. Thomas for Defendants and Respondents.

Nancy Carlson appeals from a judgment in favor of attorney Daniel Callahan and the law firm Callahan & Blaine (hereafter collectively referred to as Callahan & Blaine unless the context indicates otherwise) in this dispute pertaining to her client trust fund. The trial court sustained Callahan & Blaine's demurrer to Carlson's complaint without leave to amend on the ground it was barred by principles of res judicata due to prior litigation concerning Carlson's client trust account. Carlson contends her current complaint raises different issues than those raised in the prior action and thus res judicata does not apply. We disagree and affirm the judgment.

STANDARD OF REVIEW

We begin by reiterating the well-established standard for our de novo review of a dismissal following sustaining a demurrer without leave to amend. "'"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff.' [Citations.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*).)

FACTS

The Prior Litigation

This is the second time we have been asked to consider this dispute between Carlson and Callahan & Blaine. In *Carlson v. Callahan & Blaine et al.* (March 26, 2008, G038253) [nonpub. opn.] (*Carlson I*), we affirmed a judgment in favor

of Callahan & Blaine in a consolidated action. For relevant background, we turn to our prior opinion and add additional facts from the pleadings and other court documents of which judicial notice has been taken below or on appeal.

In the 1990s "Callahan & Blaine represented Carlson, the sister of one of the law firm's partners, Daniel Callahan, in litigation matters which arose after Carlson was injured in a skiing accident, further injured by the professional negligence of her medical providers, wrongfully denied disability insurance benefits, and injured by the professional negligence of a law firm to which [her brother] had referred her. Several retainer agreements were signed by Carlson during the period she was represented by Callahan & Blaine. From various settlements obtained by the firm on Carlson's behalf, $816,110.76 was deposited into a client trust account. From this account, Carlson received payments in 1993 and 1994 totaling $532,347.28, and the law firm claimed the remaining amount, $283,513.48, as payment for its legal services and costs." (*Carlson I, supra,* typed opn. p. 3.)

In 2001, Carlson filed a mandatory fee arbitration request with the California State Bar, claiming Callahan & Blaine was supposed to have represented her for free in the litigation matters and she was owed a refund of attorney fees and costs withheld from her trust account by Callahan & Blaine. Callahan & Blaine argued Carlson's claims were time-barred. In 2005, after a non-binding arbitration, a State Bar arbitrator rejected Callahan & Blaine's statute of limitations defense. The arbitrator rejected Carlson's "free legal services" claim, but concluded Callahan & Blaine had over charged her by $116,708 and with interest awarded her $211,073. (*Carlson I, supra,* typed opn. pp. 3-4.)

On January 6, 2006, Callahan & Blaine rejected the arbitrator's decision and filed a complaint against Carlson containing causes of action for declaratory relief and common counts. (Super. Ct. Orange County, 2006, No. 06CC01970, hereafter "the Callahan & Blaine complaint.")

The Callahan & Blaine complaint alleged Callahan & Blaine represented Carlson and her husband in four litigation matters during the 1990s. Two were related to Carlson's personal injuries from her skiing accident in the 1980s: the Equitable case (involving denial of disability benefits), and the Hersh case (involving Carlson's dispute with the law firm that handled her personal injury and medical malpractice claims). Funds received from settlements and judgments relating to Carlson's personal injury claims were placed in Carlson's client trust account. The other two litigation matters were related to Carlson's husband's business: the Mission case, and the Grieve case.

The Callahan & Blaine complaint alleged Callahan & Blaine "had retainer agreements with Carlson as to each matter, provided Carlson with billing invoices on a monthly basis on each matter, and Carlson understood and approved of the payment for the legal services on all four matters from her client trust account. The Mission and Grieve cases were resolved in 1992 and 1993 respectively. All services and payments in the Hersh and Equitable cases were complete by the end of 1995. Callahan & Blaine had filed a State Bar complaint against the law firm that was the subject of the Hersh case. All involvement in that matter ceased in February 1997 . . . ." (*Carlson I, supra*, typed opn. pp. 4-5.) The Callahan & Blaine complaint alleged "[a]t all times through February 1997, [Callahan & Blaine] regularly sent . . . Carlson . . . detailed itemized monthly statement[s], reflecting services rendered and attorneys' fees and costs incurred [under the written retainer agreements] and in connection therewith regularly debited the balance remaining in . . . Carlson's trust account in payment of those fees and costs. As of approximately February, 1997, the balance in . . . Carlson's trust account had been reduced to zero." Carlson did not file her fee proceeding with the State Bar until August 2001.

On January 11, 2006, Carlson filed a form complaint against Callahan & Blaine containing a fraud cause of action and an intentional tort cause of action arising out of its representation of her (Super. Ct. Orange County, 2006,

No. 06CC02060) and the actions were consolidated. After two rounds of successful demurrers by Callahan & Blaine on the grounds Carlson's action was time-barred, Carlson filed her second amended complaint (hereafter "the Carlson complaint").[1]

The Carlson complaint alleged Callahan & Blaine was supposed to represent her for no charge in the litigation and represented to her "[it] would hold her trust account funds in trust for her, that she would always have the right to access these funds and that she would always have the right to a complete and up to date accounting of said trust funds." Carlson alleged Callahan & Blaine did not disclose it was using her trust account funds to pursue legal actions on her behalf, and without her consent, for the purpose of generating fees for itself. She alleged Callahan & Blaine "actively concealed" that it was charging her for its legal services, "intentionally mislead her about the use and status of her trust account funds," "denied [her] access to her trust account and continue[d] to deny [her] access to her trust account funds[,] and she was "damaged due to her inability to access her trust account funds." Callahan & Blaine's demurrer to the Carlson complaint, again on the grounds the statute of limitations had run, was sustained without leave to amend. (*Carlson I*, *supra*, typed opn. p. 6.)

While the Carlson complaint was going through amendments and demurrers, Carlson answered the Callahan & Blaine complaint. After Carlson repeatedly failed to comply with the court's discovery orders, the trial court granted Callahan & Blaine's motion for terminating sanctions, struck Carlson's answer to the

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[1] In our prior opinion, we summarized the allegations of the Carlson complaint. The Carlson complaint was not one of the documents of which Callahan & Blaine requested judicial notice in connection with its demurrer to the current complaint. We advised the parties we would take judicial notice of the Carlson complaint on our own motion and gave them an opportunity to object. (Evid. Code, §§ 455, subd. (a), 459, subd. (a).) We received no objections. On our own motion we take judicial notice of the second amended complaint filed on October 25, 2006, by Nancy Carlson in Orange County Superior Court case No. 06CC02060. (*Zelig*, *supra*, 27 Cal.4th at p. 1126 [on demurrer court may consider matters which may be judicially noticed]; Evid. Code, § 452, subd. (d) [permissive judicial notice of court record].)

Callahan & Blaine complaint, and entered default against her. (*Carlson I, supra,* typed opn. p. 6.) "On April 9, 2007, the court entered a judgment in the consolidated cases. As to the Carlson complaint, the court ordered the complaint dismissed in its entirety with prejudice. As to the Callahan & Blaine complaint, the court entered declaratory judgment that the applicable statute of limitations barred any claims or legal actions by Carlson arising out of legal services performed by Callahan & Blaine in the four litigation matters in which it had represented her." (*Carlson I, supra,* typed opn. p. 7.) The judgment also stated the statute of limitations barred any claim or legal action by Carlson against Callahan & Blaine "arising out of payments made from . . . Carlson's client trust account for attorneys fees and costs incurred in connection with" the four litigation matters.

Carlson appealed the judgment in the consolidated cases but only as to "'the judgment of dismissal pursuant to the court's order granting the defendant's demurrer to the second amended complaint in . . . case no. 06CC02060.'" (*Carlson I, supra,* typed opn. p. 7.) We affirmed the judgment. We agreed with Callahan & Blaine that Carlson's claims were "now barred by the judgment it obtained on [the Callahan & Blaine] complaint declaring that [Carlson's] claims are time-barred. Carlson did not challenge that judgment and it is now res judicata on the issue." (*Ibid.*) We concluded the default judgment Callahan & Blaine obtained on its complaint constituted an "'express admission'" by Carlson of the material facts alleged in the Callahan & Blaine complaint. (*Carlson I, supra,* typed opn. p. 8.) On November 12, 2008, after our decision in *Carlson I* became final, the trial court entered an amended judgment in the underlying litigation awarding Callahan & Blaine its costs on appeal of $2,077.70.[2]

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[2] Carlson has filed a motion requesting us to take as additional evidence on appeal under Code of Civil Procedure section 909, various documents including the November 2008 amended judgment. We ordered her motion would be decided in

The Current Action

Over four years after our decision in *Carlson I* became final, Carlson filed the current litigation against Callahan and Callahan & Blaine for breach of fiduciary duty, conversion, fraud, common counts, and accounting. Her complaint sought an accounting of her client trust account and recovery of funds she alleged should still exist in her client trust account. Her complaint alleged that in 1991, her brother established "an interest earning trust account" for her benefit into which "awards, settlements and payoffs" she had obtained were deposited. Carlson alleged that after the State Bar fee dispute arbitrator awarded her $211,073 against Callahan & Blaine, the underlying litigation was commenced resulting in a judgment entered in April 2007 for Callahan & Blaine against her. Carlson alleged that in November 2008 the judgment in the underlying litigation "was amended indicating the amount of fees [Callahan & Blaine] was entitled to withdraw from [her] trust account." Carlson alleged that in January 2011 she requested Callahan & Blaine provide an accounting of the amounts it had withdrawn from her trust account "from the November 2008 Amended Judgment" but it provided only "a partial accounting" identifying about $202,000 in fees withdrawn. By Carlson's estimate, there should still be about $500,000 in her trust account. She alleged Callahan & Blaine "failed to properly account for all receipts and interest and to properly account for any

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conjunction with the merits of her appeal. Because the November 2008 amended judgment is a document of which we may take judicial notice (*Zelig, supra,* 27 Cal.4th at p. 1126; Evid. Code, §§ 452, subd. (d), 459, subd. (a)), as to that document only we treat Carlson's motion as a request for judicial notice, and we take judicial notice of that document. Carlson's motion also seeks to place before us 11 evidentiary documents all of which predate the underlying litigation, including bank records, accounting documents, and correspondence from Callahan & Blaine allegedly pertaining to her client trust account. Carlson has not demonstrated any of those documents are relevant to this appeal as none are documents of which the trial court, or this court, could properly take judicial notice for purposes of ruling on a demurrer. Accordingly, her motion to take additional evidence on appeal is denied.

balance which remained in [her] trust account" and "fail[ed] to return the balance in [her] trust account . . . ."

Callahan & Blaine filed a demurrer to Carlson's complaint on the ground res judicata principles barred her action. It asserted all Carlson's claims relating to her trust account were precluded by the judgment against her in the underlying litigation and this court's decision in *Carlson I*, which established that as of February 1997, Carlson's trust account balance was zero. The trial court agreed. It sustained the demurrer without leave to amend and dismissed the action. Carlson appeals.

DISCUSSION

1. Res Judicata

Carlson contends the trial court erred in concluding her action is barred by principles of res judicata. She argues the prior litigation concerned only Callahan & Blaine's entitlement to withdraw attorney fees and costs from her client trust account whereas the present action seeks to litigate whether there are any funds remaining in her client trust account and whether Callahan & Blaine had adequately accounted for her funds. We reject her contention.

"'The doctrine of res judicata rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction, and should not be permitted to litigate it again to the harassment and vexation of his opponent.'" (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1427 (*Pollock*).) "'[T]he rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable. [Citation.]' [Citation.]" (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.) "'[R]es judicata precludes parties from splitting a cause of action into a series of suits in piecemeal litigation, since it operates as a bar not only when the grounds for recovery in the second action are identical to those pleaded in the first but also where a different theory or

request for relief is asserted. [Citation.]' [Citation.]" (*Henry v. Clifford* (1995) 32 Cal.App.4th 315, 321.)

The doctrine of res judicata applies when: "(1) the issues decided in the prior adjudication are identical with those presented in the later action; (2) there was a final judgment on the merits in the prior action; and (3) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication." (*Pollock, supra,* 112 Cal.App.4th at p. 1427.) Carlson does not dispute the latter elements of the doctrine of res judicata have been met. There was a final judgment on the Callahan & Blaine complaint, and the Carlson complaint in the consolidated prior litigation—a judgment affirmed by this court in *Carlson I, supra*, G038253—and the parties in this case and the prior litigation are identical. Carlson's only contention in this appeal is the current action involves different issues.

In determining if there is identity of issues for purposes of res judicata, California employs the primary rights test. "For purposes of identifying a cause of action under the doctrine of res judicata, 'California has consistently applied the "primary rights" theory, under which the invasion of one primary right gives rise to a single cause of action.' [Citation.] But ' . . . the "cause of action" is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief.' [Citation.]" (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 340-341, fn. omitted.) "Consequently, '[i]f the facts alleged show one primary right of the plaintiff, and one wrong done by the defendant which involves that right, the plaintiff has stated but a single cause of action, no matter how many forms or kinds of relief he may claim that he is entitled to, and may ask to recover; the relief is no part of the cause of action.' (*Id.* at p. 341.) Stated simply, "'[r]es judicata precludes piecemeal litigation by splitting a single cause of action or relitigation of the same cause

of action on a different legal theory or for different relief. [Citation.]'" (*Weikel v. TCW Realty Fund II Holding Co.* (1997) 55 Cal.App.4th 1234, 1245.)

Here, the prior litigation and the current litigation are asserting the same primary right—Carlson's right to funds that were held in trust for her by Callahan & Blaine and Callahan & Blaine's alleged failure to adequately account for those funds. The Callahan & Blaine complaint filed in January 2006 alleged Callahan & Blaine held funds in a client trust account for Carlson received from settlements and judgments relating to Carlson's personal injury claims and litigation matters arising therefrom. It alleged Carlson signed retainer agreements regarding payment of attorney fees and costs to Callahan & Blaine from the four litigation matters it handled on her behalf and she agreed those fees and costs would be withdrawn from her client trust account. The Callahan & Blaine complaint alleged all involvement in the litigation matters by February 1997, it regularly sent Carlson monthly itemized statements showing the attorneys fees and costs incurred and the debited balance remaining in her trust account, and "[a]s of approximately February, 1997, *the balance in . . . Carlson's trust account had been reduced to zero*." (Italics added.)

Although Carlson asserts the Callahan & Blaine complaint only had to do with whether it could withdraw attorney fees and costs from her trust account, she ignores that she too filed a complaint. The Carlson complaint, also filed in January 2006, alleged Callahan & Blaine was supposed to represent her for no charge in the litigation and represented to her "[it] would hold her trust account funds in trust for her, that she would always have the right to access these funds and that she would always have the right to a complete and up to date accounting of said trust funds." She alleged Callahan & Blaine were "den[ying] [her] access to her trust account funds and continue[d] to deny [her] access to her trust account funds[,] and she was "damaged due to her inability to access her trust account funds." Thus, even though the Callahan & Blaine complaint pertained to whether it was entitled to withdraw attorney

fees from Carlson's client trust account, Carlson's complaint squarely raised allegations of her access to funds in her client trust account and whether Callahan & Blaine was properly accounting for those funds.

Carlson's default was entered on the Callahan & Blaine complaint after her answer was stricken due to her failure to comply with the court's discovery orders, and Callahan & Blaine's demurrer to the Carlson complaint was sustained without leave to amend because Carlson's claims were time-barred. A judgment was entered dismissing Carlson's action in its entirety, and entering a declaratory judgment on the Callahan & Blaine complaint that claims arising out of legal services, or payments made from Carlson's trust account to Callahan & Blaine for attorney fees and costs for the four litigation matters, were time-barred.

Carlson appealed the judgment challenging only the dismissal of her complaint. In our opinion in *Carlson I, supra,* G038253,[3] we affirmed the judgment. (*Carlson I, supra*, typed opn. p. 7.) We agreed with Callahan & Blaine that Carlson's claims were "now barred by the judgment it obtained on [the Callahan & Blaine] complaint declaring that [Carlson's] claims are [time-barred]. Carlson did not challenge that judgment and it is now res judicata on the issue." (*Ibid.*) We held the default judgment Callahan & Blaine obtained on its complaint constituted an "'express admission'" by Carlson of the material facts alleged in the Callahan & Blaine complaint. (*Carlson I, supra*, typed opn. p. 8.) That necessarily included the allegations of the Callahan & Blaine complaint that all involvement in the litigation matters ended by February 1997, that it regularly sent Carlson monthly itemized statements showing the attorneys' fees and costs incurred and the debited balance remaining in her trust account,

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[3] Our prior unpublished opinion may be cited under California Rules of Court, rule 8.1115(b)(1), because it "is relevant under the doctrines of law of the case, res judicata, or collateral estoppel[.]"

and "[a]s of approximately February, 1997, *the balance in . . . Carlson's trust account had been reduced to zero.*" (Italics added.)

Carlson cannot now attempt to split up her claim by alleging the former litigation pertained only to attorney fees and costs that were withdrawn from her client trust account and not to whether there was other money remaining in the client trust account or whether Callahan & Blaine had adequately accounted for that money. A discharged professor attempted the same type of piecemeal litigation in *Pollock, supra*, 112 Cal.App.4th 1416. The professor's first action was filed while her termination was in process and the appellate court in an earlier opinion held administrative mandamus was her exclusive remedy for her claim of procedural defects in the proceeding. The professor filed a second lawsuit after her termination was complete. The court concluded: "The issues in [the] two complaints are the same, regardless of the theory and title [plaintiff] attaches to the various causes of actions. The primary right [she] seeks to vindicate [citation] in both [actions] is the injury to her right to fairness in the procedures used to revoke her tenure and discharge her from employment." (*Pollock, supra*, 112 Cal.App.4th at p. 1427.) Res judicata barred prosecution of several causes of action because they sought vindication of the same primary right. Here, the prior litigation and the current litigation involve the same underlying issue—whether Callahan & Blaine was properly accounting for the funds in Carlson's client trust account. Carlson cannot re-litigate those issues.

The trial court correctly sustained Callahan & Blaine's demurrer. Carlson has not argued the trial court erred in denying her leave to amend her complaint, nor does she offer any suggestion on appeal as to how she would amend if given an opportunity to do so. (See *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1497, fn. 19 ["[w]hen reviewing a demurrer that has been sustained without leave to amend, '[t]he plaintiff has the burden of proving that an amendment would cure the defect[,] [citation]'" and where the plaintiff has "not offered any proposed amendment, [the

plaintiff has] not carried [its] burden"]; *Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1468 ["'[l]eave to amend should *not* be granted where . . . amendment would be futile'"].) Accordingly, we find no abuse of discretion by the trial court in sustaining the demurrer without leave to amend.

2. Motion to Dismiss and Motion for Sanctions for Frivolous Appeal

Callahan & Blaine has filed motions to dismiss Carlson's appeal as frivolous and to impose sanctions for a frivolous appeal. Because we have substantively addressed and rejected the merits of Carlson's appeal, the motion to dismiss the appeal is denied as moot. Furthermore, although repeated attempts to relitigate issues that are barred by res judicata can support imposition of sanctions on appeal (see *Beckstead v. International Industries, Inc.* (1982) 127 Cal.App.3d 927, 934-935; *Nelson v. Crocker Nat. Bank* (1975) 51 Cal.App.3d 536, 541), we decline to exercise our discretion to impose sanctions in this case.

DISPOSITION

The judgment is affirmed. Appellant's motion to take additional evidence on appeal is denied. Respondents' motion to dismiss and motion for sanctions on appeal are denied. Respondents are awarded their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

FYBEL, J.